In the

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 2416.

ANDREW WEST, *Appellant,*

vs.

EDWARD RUTLEDGE TIMBER COMPANY and NORTHERN PACIFIC RAILWAY COMPANY, *Respondents.*

Brief for Respondents.

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Counsel for Respondents.

THE PIONEER COMPANY, ST. PAUL

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Statement.

The brief which has already been filed on behalf of the Northern Pacific Railway Company by Mr. Bunn and Mr. Donnelly contains a very clear and concise statement of the essential facts, and presents in an entirely satisfactory way the argument for respondents on the question which we consider the pivotal point in the case. We fully concur in the view that the question to which Mr. Bunn and Mr. Don-

nelly have confined their brief is the vital and essential question before the court, and that the disposition of the case can and should turn upon that question alone. This was the view which controlled the writers in the argument of this case in the court below, and of the cases in the Department of the Interior which culminated in the Secretary's decision in Daniels vs. Northern Pacific, printed as an appendix to the brief of Mr. Bunn and Mr. Donnelly. But while this is so, and while we do not purpose to retraverse any of the ground so well and effectively covered in the brief of our associates, there are nevertheless certain features of the case, in matters of fact and of law, not touched upon in that brief, which (by way of extreme precaution) we desire to put before the court in order that its consideration of the case may be founded upon a full comprehension of all its phases.

It may be well to emphasize the fact that West, the appellant, did not initiate his claim until two years after the rights of the respondent Railway Company had attached. The Railway Company filed its selection list on June 21, 1901, and West did not go upon the land until May 15, 1903. (Record, pp. 28, 53, 63). There is no dispute as to the priority, in point of time at least, of the Railway Company's claim. West can prevail only upon the theory that this claim was inherently invalid from its inception. If the selection was good, in the sense that the land was of a character subject to that form of appropriation, and that the railway company sufficiently complied with the law in matters of procedure, then it is clear that West acquired no rights by his settlement, and the Department properly rejected his application and issued the patent to the Rail-

way Company. In other words, West's case rests wholly upon the idea that the Railway Company's procedure was fatally defective in some respect essential to the validity of the selection, or that the land was not of such a character that it could lawfully be selected under the act of 1899. Unless this is so, the maxim "first in time, first in right" controls.

Although this particular land was still unsurveyed at the time of West's first act of settlement, it was regularly surveyed in the field and the lines of survey run and marked by the Government surveyors, in the first week of July, 1903—that is, not more than six or seven weeks after West went upon the land (Record, p. 31). And manifestly when the survey boundaries of the land were so established by the surveyors, and precision thus given to the description employed in the Railway Company's selection list, West had put practically nothing into the venture except the consideration paid Hanson. He had doubtless performed the "acts of settlement" necessary to secure priority as against a *subsequent* claimant; but the evidence does not permit the inference that within this period of six weeks he had made any substantial expenditure of time, effort or money in pursuing his claim. And, whatever doubt or uncertainty might, under appellant's theory of the case, have inhered in the form of description used in the Company's selection, was removed by the survey in the field. In this connection the court is respectfully referred to the Secretary's decision of June 13, 1914, in the case of McDonald v. Northern Pacific, a certified copy of which will be filed with the clerk.

When West went upon the land he did not, as he alleges in his complaint (Record p. 2), find a virgin wilderness with nothing to indicate the possibility of prior appropriation. On the contrary he found a cabin and clearing, blazed boundaries, and posted notices declaring that the

land was claimed by one John Hanson, with whom West bargained for the "improvements" and possessory rights. Hanson had made settlement and built a cabin in the summer of 1902, the year before West's claim was initiated, but a year or more *after* the selection of the land by the Railway Company. It is apparent that the boundaries of Hanson's claim were intended to be coincident with the lines of the quarter section as it would be established by the survey, and that this was understood by West. The testimony of appellant's witness Edin shows that he himself ran the lines of this claim for Hanson, and that he "undertook to tie them (the quarter section lines) up to the Government lines which had already been run, as near as we could." The nearest "government line" at that time was the south line of Township 45, Range 3, which was the north line of the township in which is situated the land in controversy. As soon as the field survey of this township was made, West readjusted the lines of his claim to conform to the survey lines, which varied somewhat from those run by Edin. (Record, pp. 28-31, 33-34.) It cannot be doubted that West knew that his settlement was on what would be the northeast quarter of Section 20, and that the form of description used in the company's selection was amply sufficient to inform him of the existing conflict, even before the survey in the field—which was made but six weeks after his settlement was initiated.

The land in controversy is rough, broken and mountainous, and heavily timbered with timber of the most valuable kind. It may be true that if the timber were removed a part of the land would be susceptible of cultivation of a sort. But no one familiar with the conditions in that country would for a moment believe that permanent residence or continued cultivation is ever in the mind of the settler on land of this character. The value of the land is in the timber, and the course of the lumber in-

dustry in that country is such that the unvarying history of claims of this kind is that as soon as the claimant has acquired title he sells out—land, timber and all—to some lumber company and moves off the land; if indeed he has not moved off immediately after final proof.

Much is said by appellant's counsel of West's sacrifices, and of the time and money he has spent in the effort to acquire this valuable tract of timber. And the argument moves on the basis that all this expenditure and sacrifice were made in ignorance of the existence of any prior claim to the land, and that this ignorance was due to the failure of the Railway Company to mark out the limits of its claim by monuments and blazed boundaries, and to the fact that the selection list described the land in terms of future survey; which, counsel insists, did not enable West to identify the land selected with that upon which his settlement was made.

It may be true that when West went upon the land he did not know that it was subject to a prior selection by the Company. He says he did not, and his testimony was, from its nature, not open to contradiction. But if this is so, it is because West neglected to inquire whether the public records disclosed a prior appropriation. For the allegation of the complaint and the statements in appellant's brief to the effect that at the time of West's settlement there was nothing of record in the Coeur d'Alene Land Office or in the General Land Office at Washington disclosing the Railway Company's rights under its selection, are quite without justification—and are, of course, contrary to the fact. Certainly the testimony of the witness Davegio (Record, pp. 31-33) does not support this conclusion.

Under the established practice of the Land Department (which we understand this court judicially notices) such selection lists have always been filed in

duplicate or triplicate, one copy being kept on file in the local land office and another being transmitted to the General Land Office at Washington; and the selection is noted on the tract books and records in the local land office and in the General Land Office. See departmental opinion in Daniels vs. Northern Pacific, printed as an appendix to the brief of Mr. Bunn and Mr. Donnelly. Now it must be presumed, at least in a case like this, where (as we shall hereafter show) all presumptions run in favor of the patent title, that the public officers duly performed their duty in these respects. But it is unnecessary to resort to this presumption, for the record carries affirmative contemporaneous proof on the point. The Company's selection list No. 61, introduced in evidence by the appellant, contains a certificate by the Register and Receiver under date of June 21, 1901, reciting that the list has been duly filed and that upon examination of the plats and records, it appears that the land is subject to selection, and declaring that: "We have therefore approved the foregoing list and selection of lands therein described and have *made due notation thereof upon the records of this office.*" (Record, pp. 48-53.) See also the express finding of the Commissioner in his decision of January 5, 1907. (Record, p. 63.)

Now the Railway Company had done all those things required of it by the law and the practice of the Department to fasten its claim upon the land. It had failed in nothing requisite to be done for its protection and to give notice of its claim. That claim, in all of its particulars, was matter of record in the Coeur d'Alene office and in the General Land Office at Washington, where proper inquiry at any time would have disclosed the facts. If the description, which was in terms of future survey, was not suffici-

ently specific to identify the particular land to the understanding of one examining the records on May 15, 1903, the date of West's settlement, it was made perfectly clear and definite by the survey in the field less than seven weeks later. And if it is true that West did not in fact learn of the Company's claim until he undertook to file his homestead application in July, 1905, it is also true that at that time he came into full knowledge, not only that the land was subject to the Company's claim but also that that claim was superior in law, as well as prior in point of time, to his settlement right; since his application was then rejected on the ground that the Railway selection was paramount. This was only two years after West's settlement and more than nine years ago; so that most of the time and practically all the work and money West has spent in his effort to acquire title, was spent with full knowledge of the nature and priority of the Company's rights.

This would be no reason for denying West the land if the Company's claim were really invalid, and it has no real bearing upon the questions of law which the court must decide. But the appeal to sympathy has been strongly made in the argument for appellant, and it is just as well the court should be apprised of the real situation. We agree with the trial judge that the claims of the pioneer settler always appeal strongly for sympathy, and we do not say that the present appellant is wholly without claim to sympathy of this sort. But his case is very different from that of the real homeseeker, who has proceeded in ignorance of an adverse title, and whose improvements and cultivation have given the land its chief value—the sort of case so common in the western prairie states a generation ago. The appellant played for the high stake of a valuable tract of timber, in a speculation which may have been legitimate, but which was conducted with open eyes.

And the charge that he was misled or deceived by the state of the records or by the form of description used in the selection list is wholly unjustified.

Argument.

I.

We have already said that we think the particular question to which Mr. Bunn and Mr. Donnelly address their brief is the pivotal point in the case, and that the learned District Judge was right in putting his decision upon that ground—as did the Secretary of the Interior in the case of Daniels vs. Northern Pacific. And we believe that that is the ground upon which this court can most appropriately base an affirmance of the decree appealed from. But there is another ground, not inconsistent with that, which would compel the same result, even if the Court were of a different mind than the Secretary and the court below with respect to the question deemed by them to be controlling. The proposition may be stated thus:

If it be conceded that the construction placed by the Department and the court below upon the act of 1899, *with respect to the form of description to be employed and with respect to the necessity for marking boundaries and posting notices, was erroneous; nevertheless the Railway Company and its grantee are protected by the rule that where a party has proceeded, in the acquisition of rights under the public land law, in accordance with a practice established by the Department (whether such practice is founded upon formal regulation, decision, or customary usage), his rights cannot be affected by any change of rule, even though it be considered that the former practice was rooted in an incorrect construction of the law or in un-*

sound views of administrative policy. The selection attacked in this case was made in exact compliance with the practice established by the Department shortly after the passage of the act in question, and steadfastly maintained and approved by it without change for many years thereafter; and rights founded thereon cannot now be defeated because it is conceived that the practice was wrong, even though the court should be of the opinion that the act was not rightly construed by the Department in the first instance.

The principle is most firmly established by the uniform current of decisions of the courts and the Department, that a rule of *practice or procedure,* whether based upon an express or formal regulation, or upon departmental rules or decisions, or upon established or customary practice, protects a claimant who has complied therewith, as against any subsequent abrogation of the rule; notwithstanding the rule itself may be based upon an erroneous construction of the law. And it is equally well established, as an outgrowth of this doctrine, that a rule or regulation governing practice or procedure in the Department will never be given retroactive effect to the prejudice of rights initiated under a former practice.

Turning first to the decisions of the Department, the leading case appears to be Mary R. Leonard, 9 L. D., 189. In that case a timber-culture claimant had made proof of entry and cultivation in compliance with the practice in force at the time of the entry; but by a decision subsequently rendered it was held that this practice was based upon an erroneous construction of the timber-culture law. The Department nevertheless held that the entryman was protected by compliance with the previous practice, even though erroneous, and Secretary Noble said:

> "Under the latter, which it is not denied by the counsel for the petitioner, is the correct construction

> of the law, the proof was insufficient. It is contended that inasmuch as the proof was in accordance with the law as construed when it was offered and accepted, that the subsequent change of construction should not be held to operate retroactively so as to invalidate it. In the case of Miner v. Mariott, 2 L. D., 709, it is said by this Department, that though 'a construction is clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation.' * * * In its practical administration, the law must be held to be what for the time being it is construed to be by the tribunals lawfully constituted for that purpose. This course is not only dictated by the necessity of the case, but is in accordance with reason and justice. To give a retroactive effect to a change of construction by a court or other tribunal, so as to render illegal acts which have been performed with trouble and expense in accordance with and on the faith of the former construction would seem to be as 'unjust as to hold that rights acquired under a statute may be lost by its repeal,' and as objectionable as the enactment by legislative bodies of retrospective laws, which 'are generally unjust and to a certain extent forbidden by that article in the Constitution of the United States which prohibits the passage of *ex post facto* laws or laws impairing contracts.' All that can be required of the citizen by any just government is that he conform to the law as at the time expounded by its courts or other tribunals invested by it with such authority."

Miner v. Mariott, 2 L. D., 709, cited in the Leonard case, is another leading authority. In that case it was held that a previous practice of the Department (not based upon specific regulations, but upon custom and rulings) with respect to the time within which an adverse claim might be filed, was erroneous, being founded upon a wrong construction of the statute. But the Secretary held that the claimant was protected by his compliance with the practice previously sanctioned, saying:

> "The rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your office. *Though that construction is, in my opinion, clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation. Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal.*"

In Henry W. Fuss, 5 L. D., 167, cited in the Leonard case, assignments of desert-land entries made while a rule allowing the same was in force were recognized, notwithstanding that rule was founded upon what was afterwards held to be an erroneous interpretation of the statute. Secretary Lamar said:

> "Although it is silent on this question, I think a reasonable construction of the act as a whole, its purpose and intent being considered, warrants the rule against assignment; but being a matter of construction, or more correctly speaking of administrative policy, and a question which has been involved in some doubt, as would appear from the fact that the rule has been changed, *the regulation of your office which recognized the right of assignment had, until revoked or overruled, the force and effect of law, so that rights acquired and valid thereunder should be protected* (citing authorities)."

In Cudney v. Flannery, 1 L. D., 165, Secretary Teller said:

> "The regulations and rules of your office and of this Department in force at the date of Flannery's entry have the force of law as respected a tract subject to entry. There was then no objection to such an entry, and Flannery's was allowed as legal and made in accordance with what was considered a correct interpretation of the statute. *He thereby acquired rights which cannot now legally or equitably be repudiated*

> * * * *even though such an entry might not now be allowed. The latter rulings cannot have this retroactive effect.*"

In David B. Dole, 3 L. D., 214, Secretary Teller said:

> "Although I find nothing in the act to warrant so broad a construction of its provisions * * * yet these instructions had the force of law, and parties had the right to assume that this was the legal construction of the act, and that assignees of such entries would be protected in their purchases, and have the rights of entrymen. I think it immaterial that the construction was erroneous and unwarranted, so long as it was the official announcement of the law by the Land Department. * * * I do not understand that a party acts under a misapprehension of the law, so as to lose any right, when he acts under its official interpretation. The misapprehension in such a case is upon the part of the interpreting authority, and not upon him who in the prosecution of a claim conforms to such interpretation. A different rule would permit every person to construe the law for himself; and hence, your office being a proper exponent of this law, entrymen and their assignees acting under such exposition should not be required to forfeit any right by subsequent construction inconsistent with the first."

The instructions of July 16, 1889, 9 L. D., 86, contain the following language:

> "But if the entry was made under rulings of the Department in force when the application was made, that ruling should be allowed to stand and control the case. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal. * * * It seems to me that, inasmuch as the Department from the time of the passage of the bill up to the circular of the date of June 27, 1887, erroneously construed the true spirit and intent of the act, and in pursuance thereof numerous entries have been made under the law as thus

promulgated, amounting to some 2,500 or more, that such entries should be protected under the construction thus given the act, giving such construction all the force and effect of law. Were it not so, great wrong and inconvenience would result. In this character of entries it has been repeatedly held that, if the entry is made under rulings of this Department in force when the application is made, it should be allowed to stand. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal (citing authorities)."

The same doctrine has been applied, in varying language and under various sets of circumstances, in a great number of departmental decisions, among which are the following:

Milne v. Ellsworth, 3 L. D., 213,
Isham Floyd, 5 L. D., 531,
James Spencer, 6 L. D., 217,
Candido v. Fargo, 7 L. D., 75,
C. P. Masterson, on review, 7 L. D., 577,
William Thompson, 8 L. D., 104,
John M. Lindback, 9 L. D., 284,
J. H. Kopperud, 10 L. D., 93,
Jacob Oswald, 11 L. D., 155,
James Lee Lode v. Little Forepaugh Lode, 11 L. D., 391,
Oro Placer Claim, 11 L. D., 457,
Edwin F. Frost, 21 L. D., 38,
Tustin v. Adams, 22 L. D., 266, 270,
Ella I. Dickey, 22 L. D., 351,
State of California, 22 L. D., 428,
Kirk v. Brooks, 24 L. D., 448,
Labathe v. Robords, 25 L. D., 207.

The latest word of the Department on the subject is found in a recent decision of the present administration; Rough Rider and Other Lode Mining Claims, 42 L. D., 584. This case was before the Department on petition for the

revocation of prior decisions cancelling certain mineral entries, on the ground that such entries should be deemed protected by the fact that they were made in accordance with a rule in force at the time they were made; which, however, was afterwards declared to be erroneous and abrogated by the Department. The decisions were revoked and the entries allowed. It was said:

> "There can be no question therefore that at those times a more liberal rule with reference to mining locations situated in this region prevailed in the land department than that applied by the Department with respect to the claims here in question in its decision of January 31, 1911, and that had said earlier rule been followed with regard to these locations they would, in the absence of other objections, have been passed to patent. This being true, and it appearing that these locations and others in that vicinity, based on the same character of discovery, had been, in reliance on such rule, purchased and dealt with as property, the Department is now of opinion that the rule under which the entries were canceled should not have been given retroactive application to the prejudice of the owners of the claims, but, on the other hand, that the said previous and long-continued practice of the land department *established a rule of property* with respect to such claims which should have been adhered to and followed in the determination of this case. Germania Iron Company v. James et al., 89 Fed. 811; James et al. v. Germania Iron Company, Belden v. Midway Company, 107 Fed. 597; Howe et al v. Parker, 190 Fed. 738; Henry W. Fuss, 5 L. D., 167; William Thompson, 8 L. D., 104; William Drew, 8 L. D., 399; French Lode, 22 L. D., 675; Gowdy et al. v. Kismet Gold Mining Company, 24 L. D., 191; Brick Pomeroy Mill Site, 34 L. D., 320; Hidden Treasure Consolidated Quartz Mine, 35 L. D., 485."

The authorities thus far cited are drawn from the published decisions of the Department. But we may draw still stronger support from the decisions of the courts.

We turn first to the great leading case of United States v. MacDaniel, 7 Pet., 1, 14. That case arose upon an attempt to recover from a clerk in the Navy Department special allowances paid him under a practice or usage in force in the Department, which was afterwards abrogated. There was no specific rule, regulation or decision sanctioning such payments—the matter was merely one of customary usage and practice in the Department. It was admitted that there was no statutory authority for such payments. The Supreme Court held the new ruling valid and effective as applied to subsequent transactions, but also held that although this new ruling might be based upon a true construction of the law, and might properly have been applied in the first instance, yet it could not be given a retroactive effect in derogation of past transactions founded upon a construction theretofore given the law by the Department, as established by its previous usage and practice; and the judgment of the court denied recovery of the sums paid. In this connection the court said:

> "A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of any department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. * * * Hence, of necessity, *usages have been established in every department of the Government, which have become a kind of common law*, and regulate the rights and duties of those who act within their respective limits. *And no change of such usages can have a retrospective effect, but must be limited to the future.* Usage cannot alter the law, but it is evidence of the

construction given to it, *and must be considered binding on past transactions.*"

Perhaps the most interesting discussion of the question involved in the present cases is found in the decisions of the Circuit Court of Appeals for the Eighth Circuit in Germania Iron Co. v. James, 89 Fed., 811, and James v. Germania Iron Co., 107 Fed., 597; successive appeals in the same case, which was a suit in equity by an unsuccessful contestant before the Department to have his successful adversary declared to hold the patent title as trustee for the complainant on the ground that the decision of the Secretary awarding patent to the defendant was erroneous in law. In the first case (Germania Iron Co. v. James, 89 Fed., 811) Judge Sanborn said:

> The Secretary of the Interior held * * * five years afterwards, that a prior application to enter the land, made * * * in violation of the rule and practice of the Department, was superior in right to that of the first applicant after the receipt of the decision. * * * This ruling was clearly an error in law, and it entitles the appellant to the relief it seeks. * * * *The reasonable and established rules and practice of judicial tribunals become as much a part of the law of the land as the statutes under which they act.* * * * *Moreover, the rule and practice here under consideration stand upon far higher ground than the ordinary rules for the mere conduct of proceedings in courts. They condition the inception, the foundation, the very existence, of all rights and title to this land. Rights initiated in acordance with them became rested interests in property*, and attempts to establish rights in violation of them were as though they had not been. They had become an established rule of property, upon which men relied and had the right to rely. The maxim, '*Stare decisis, et non quieta movere*,' applies nowhere more universally, or with more salutary effect, than to those rules and that practice under which property

is acquired or secured. *It is often far more important that these should be certain and changeless than that they should be right.* Men engage in business occupations, buy, sell, and contract, in reliance upon them. Lawyers advise their clients and enforce and protect their rights with constant reference to them, and while all interests will readily adjust themselves to, and protect themselves under, erroneous rules, there is neither protection nor safety for any interest under shifting rules. * * * *Nor was it within the supervisory power of the Secretary or of the Commissioner to set aside or annul rights acquired under this rule and practice, or to deprive Hartman of his title to this land, by a retroactive decision, made five years after his right to it had vested, to the effect that the established rule or practice when he made his entry was either inconvenient or erroneous.* They might undoubtedly have made and promulgated a new rule which would have governed cases arising after a new rule of practice had been made and had become known, but Hartman and the other applicants * * * *had the right to the determination of their claims according to the practice as it then existed. Retroactive decisions of judicial tribunals are as vicious and ineffectual as retroactive laws* (citing authorities). * * * System, order, and the uniform application of the laws, the rules, and the practice to all litigants alike, are as essential to the administration of justice in the Land Department as in the courts. * * * What a farce the attempt to secure rights in any judicial tribunal must become, if its rule and practice are ignored or applied at the arbitrary will of the judge who presides over the court! Under such an administration of the Land Department, the rights and titles which the law attempts to protect and secure would become naught but privileges dependent upon the gracious favor of its officers. The power to degrade them to this rank cannot be found in the supervisory authority of the Secretary or of the Commissioner."

On the second appeal (James v. Germania Iron Co., 107 Fed., 597) Judge Sanborn said:

"The rights of these parties vested on February 23, 1889. They were initiated under and conditioned by the laws of the land *and the rules and practice of the Department on that day, and no subsequent rules, decisions, or practice could divest them of the property they then secured, or deprive them of their equitable or legal rights to the title to the land which they then acquired.* Cornelius v. Kessel, 128 U. S., 456; Shreve v. Cheesman, 69 Fed., 785. For this reason the *subsequent* practice and decisions of the Department, which have been carefully considered, will not be reviewed at length in this opinion, but will be here laid aside with the remark that they are without legal effect upon the issues in this case. * * * Even if the opinions cited against it had decided that the rule was abrogated or limited, they would have been nothing more than erroneous judgments. They could not have affected the rule. * * * Nothing short of an express and formal repeal or abrogation of the rule and public notice thereof by the Secretary, who alone had the power to establish and overthrow rules, could have destroyed its force or limited its terms. * * * Hartman had the right to rely upon this rule and practice, and to secure this land in accordance with it."

In Howe vs. Parker, 190 Fed., 738, 757, Judge Sanborn, speaking for the Court of Appeals, said:

"The settled rules and practice and the uniform decisions of the department constitute both rules of law and of property, and equitable titles in entrymen cannot be destroyed by the Land Department in violation of them. System, order, and the uniform application of the established rules and practice of the Department to all litigants alike are as essential to the administration of justice in the Land Department as in the courts. What a farce the attempt to secure or protect rights in any judicial or quasi judicial tribunal must become if its rules and decisions are ignored or applied to each case as it arises at the arbitrary will of the officer who presides. *Equitable titles*

> *of claimants to lands under the acts of Congress may not be annulled by the Land Department in violation of its settled practice, or of a rule of law and of property established by a long line of decisions of its officers,* nor without legal notice to the parties in interest and an opportunity to be heard."

We come now to a series of cases which cite and apply the doctrine of United States v. MacDaniel, *supra,* under conditions which made the question at issue similar to the question involved in the present case. And we may pause here to remark that we know of no instance in which the principle of the MacDaniel case has been questioned or its authority doubted. One of the earliest applications of the rule laid down in the MacDaniel case was in United States v. Buchanan, Fed. Cas. No. 14678, where the court said:

> "When the usage is established it regulates the rights and duties of those who act within its limits (citing United States v. MacDaniel, *supra*). But it is said that a different construction was given to these regulations by Mr. Secretary Paulding, and that he confirmed the views of Commodore Claxton. If the order of Commodore Claxton had been confined to supplies purchased subsequently to the receipt by him of this general order, there might have been force in this argument; *but no change of usage, even by authority, can have a retrospective effect, and must be limited to the future.*"

Rand v. United States, 38 Fed., 665, is a case which applied the doctrine of United States v. MacDaniel to the question whether certain officers of the Treasury Department were entitled to fees for certain services. There was no statutory authorization for such charges, but the previous usage of the Department permitted them.

A somewhat similar application of the rule was made in Walker v. United States, 139 Fed., 409, 416, where the

language we have excerpted from the MacDaniel case was approved and applied.

United States v. Alabama, etc., Railroad Co., 142 U. S., 615, 621, is another well-known authority, in which the MacDaniel case is cited and approved. In that case Mr. Justice Brown said:

> "We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that department * * * should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiquity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. *It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive.*"

In the very recent case of United States v. Newport News, etc., Co., 178 Fed., 194, the Court of Appeals of the Fourth Circuit applied the doctrine of the MacDaniel case to the construction of a contract between the Government and a shipbuilding company, holding the latter protected by customary practice in previous transactions. The court quoted from the MacDaniel case the language excerpted on a preceeding page, and upon that authority held that the course of customary practice in previous transactions between the Government and its contractors must be deemed to have established a rule in the light of which the contract should be construed; so that a different requirement, although supported by the terms of the contract itself, would be equivalent to a retroactive change in

established usage which could not be made to the prejudice of rights already initiated, under the principle established by the MacDaniel case.

And as lately as Haas v. Henkel, 216 U. S., 462, 480, the Supreme Court has quoted with approval the language of United States v. MacDaniel to which such frequent reference has already been made.

In State v. Kelsey, 44 N. J. L., 1, 22, the New Jersey court quoted with approval the following language of the Supreme Court of Massachusetts in Rogers v. Godwin, 2 Mass., 477:

> "And although if it were now *res integra* it might be very difficult to maintain such construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long-continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words."

In Stuart v. Laird, 1 Cranch, 299 the Supreme Court said:

> "To this objection, which is of recent date, it is sufficient to observe that *practice and acquiescence* under it for a period of several years * * * affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

In Commonwealth v. Gregory, 89 S. W. Rep., 168, the Court of Appeals of Kentucky quoted with approval the language of an earlier Kentucky case (Harrison v. Commonwealth, 83 Ky, 162), where it was said:

> "The executive branch of a government must neces-

> sarily give a construction to the laws which it must execute; and, if its construction has been followed for years, and in view of and without interference by the law-making power, then such contemporaneous and long-continued construction should not be departed from without the most cogent reasons. *A long-continued practice* under a statute, under such circumstances, ripens into an authoritative construction of it."

And finally in United States v. Hammers, 221 U. S., 220, which involved the question of the assignability of desert land entries, the Supreme Court said:

> "We do not find the act of 1891 as clear as the learned District Court did, and must give to decisions of the Land Department the weight to which in such case, the court acknowledged, they are entitled. * * * To support and give force to a practice of the Land Department under the act of 1891, to impugn its construction of the act, is certainly confusing. We cannot assume that the Land Department did not know what it was about and made its practice under the act oppose its construction of the act. * * * Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the *practice* of the officers whose duty is was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. *At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.*"

While as lately as in Roughton v. Knight, 219 U. S., 537, 546, it was said of the Forest Reserve lieu selection act of June 4, 1897, and of the necessity for and propriety of regulations prescribing the *manner* in which selections shall be made:

> "But the act *did not prescribe the method* by which

> one so situated might avail himself of the proposal. It was therefore competent for the Land Department to adopt rules and regulations for the administration of the act in this particular."

There is no room for distinction, with respect to the application of the principle declared in the authorities cited, between cases where the rule of practice or procedure which was held to protect a claimant who had complied therewith, was a rule established by express regulation, circular or instruction, or by departmental ruling or decision, and cases of a rule not founded upon express regulation or decision, but built up by custom, usage or practice. Many of the cases cited above are of the latter character, as will appear from the language we have quoted. This is especially true of some of the most important of them; notably United States v. MacDaniel, 7 Pet. 1, which is the leading case in the courts; of Miner v. Marriott, 2 L. D., 709, which is one of the leading cases in the Department; and of Rough Rider and Other Lode Mining Claims, 42 L. D., 584, which carries the latest expression of the Department on this subject. Of the same character are the following, from which no quotation has yet been made:

> "Whenever an act of Congress has by actual decision *or by continued usage and practice* received a construction of the proper department, and that construction has been acted upon for a succession of years, it must be a strong and palpable case of error and injustice to justify a change in the interpretation to be given it (2 Op., 558; 10 Ib., 52). 'When there is ambiguity or doubt in the construction of a statute, a long-continued construction of it in practice in a department would be in the highest degree persuasive, if

not absolutely controlling, in its effect.' United States v. Graham (110 U. S., 219)."

Isham Floyd, 5 L. D., 531.

"I am unable to find that the Land Department has in any case directly announced the principle that coal-land entries may be made of non-contiguous subdivisions; but it seems to be a fact that such was the practice of your office, and that in many instances entries consisting of non-contiguous subdivisions have been alowed to pass to patent. It is evident that such action was not inadvertence, but an erroneous construction of the law. The entry in the present case was allowed under the practice then prevailing in your office. It has been held by the Department that where a decision operates to change a practice or rule well established, especially if it be upon a point of interpretation not without difficulty, the action already taken by private parties in good faith under the prevailing practice may be sustained in proper cases; and although such construction may have been erroneous, it does not follow that any acts which have been performed in pursuance of or in accordance with such construction or interpretaion, are necessarily illegal (citing Miner v. Mariott and other authorities)."

C. P. Masterson, on review, 7 L. D., 577.

And in Haas v. Henkel, 166 Fed. 621, 627, it was said:

"Such regulations, as held in United States v. MacDaniel, 7 Pet. 14, *need not be in the form of writing, but may consist of established usages and practices, which have become a kind of a common law of the Department.*"

Let us emphasize the fact that the question is not one having to do with substantive rights under the statute. It is not a question of who can take under the act, or of

what land may be taken, or of the extent or character of the appropriation. It is merely a question of *procedure*—of what steps must be taken in order to perfect the right granted. The Department, construing the statute, pointed out the steps to be taken. The Railway Company followed the line thus marked out, faithfully and with exactness. The rights of the respondent Timber Company were acquired on the faith of the regularity of the Railway Company's procedure, in the light of the departmental sanction given it. No one was misled or prejudiced by the fact that the Railway Company pursued the approved practice instead of adopting a different method. The Railway Company could just as well and just as easily have taken another course, and would have done so if the Department had so directed. And it cannot be pretended that appellant's position would be any different or better if the Department had construed the act differently and had required a different course of procedure. Certainly he would not have been benefited if the selection list had described the land by metes and bounds, or in some other manner, since his evidence is to the effect that he made no inquiry at or examination of the records of the local land office and was unaware that any selection list had been filed; so, as the learned District Judge points out, he "had no knowledge of the existence of the list, and therefore, whatever may have been the form of description, it could not have influenced his action." (Record p. 86.)

2.

Now there is no question as to what the established practice in the Land Department has been with respect to selections under the act of 1899. In the brief of Mr. Bunn and

Mr. Donnelly will be found an explanation of the development of the practice of describing unsurveyed lands in terms of future survey in selections under the acts of June 4, 1897, July 1, 1898 and March 2, 1899.

The first formal regulations on this subject adopted by the Department were those applicable to the act of July 1, 1898, which were promulgated February 14, 1899. The next to be adopted were the regulations of May 9, 1899, controlling selections under the act of June 4, 1897. Extracts from these regulations will be found on pages 5 and 6 of the brief of Mr. Bunn and Mr. Donnelly. As explained in that brief, it was not until sometime after the acceptance by the Secretary of the Company's relinquishment of the base lands in the Mount Ranier National Park and the adjacent forest reserve, which was made on July 26, 1899, that the Railway Company was in position to make selections under the act of 1899. Not until after that date, therefore, was there any occasion to consider the practice to be pursued in making selections under the act.

When that time arrived the regulations of February 14, 1899, under the act of 1898, and the regulations of May 9, 1899, under the act of June 4, 1897—which contained practically identical provisions with respect to the selection of unsurveyed land—were in force and were believed to work satisfactorily.. It was, therefore, most natural and proper that the rules prescribed for selections of unsurveyed land under the acts of 1897 and 1898 should be applied to selections under the act of 1899, which also permitted the selection of unsurveyed land. And this was done.

The acts of 1897 and 1898 were of general application—the act of 1898 provides primarily for relinquishment and lieu selection by persons claiming adversely to the Railway Company—and the practice and procedure under those acts being matters in which the general public was therefore interested, there was good reason for the adoption

and publication of formal regulations thereunder. But under the act of 1899 the Railway Company was the only party necessary to be considered, since the right of exchange given to settlers in the Mount Ranier reservation was expressly made subject to the provisions of the act of 1897, and hence would be governed directly by the regulations adopted under that act. And the relinquishment of the base lands had already been made and accepted; so that the only matter for regulation was the form of selection lists to be filed by the company, and the mode of filing them. It followed that the Department deemed it unnecessary to promulgate formal regulations under the act of 1899; but it was instead informally directed that the Railway Company's selections should be made in the form and manner prescribed for selections under the act of 1898.

The practice thus established was continued in force, unmodified and unquestioned, for upwards of ten years. Nor was it a practice existing in mere casual, desultory and occasional filings. From the beginning—from within a few days of the Department's acceptance of the relinquishment of the Mt. Ranier lands—the selections under the act of 1899 came thick and fast. Questions upon such selections began to come before the Department for decision early in 1900, if not in 1899. The much cited case of Clarke v. Northern Pacific, 30 L. D. 145, was decided July 13, 1900, on appeal from the Commissioner's decision of September 30, 1899. The cases before the Department and the General Land Office involving selections under the act of 1899 have been very numerous indeed; and they were more numerous in the early days of the act than at a later period. And in every case, from the very beginning, precisely the same form of selection list was used, and precisely the same procedure followed with respect to the original selection, as in the cases at bar. It would be difficult to instance a practice more firmly established by usage and Departmental sanction. And, as we have shown, a practice

founded on usage or permissive sanction is just as sacred, and just as much the law of the Department, as one based upon positive regulation.

As long ago as in Ferguson v. Northern Pacific, 33 L. D. 634, an important and carefully considered case involving a selection made in precisely the same manner, by a selection list carrying precisely the same form of description as that involved in the case at bar, Secretary Hitchcock said:

> "By the terms of the act the company was authorized to select lands either surveyed or unsurveyed, the *only requirement* with regard to the selection of unsurveyed lands being that found in the fourth section of the act which provides that—'In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office *shall describe such tract in such manner as to designate the same with a reasonable degree of certainty:* and, within the period of three months after the lands including such tract shall have been surveyed and the plat thereof filed in said local land office, a new selection list shall be filed by said company, describing such tract according to such survey.' *With this condition the company has complied as hereinbefore shown.*"

3.

Now, as pointed out by the Secretary in Ferguson vs. Northern Pacific, the "only requirement" imposed upon the Railway Company with respect to the original selection of unsurveyed land, is that it shall file in the local land office a selection list describing the lands selected. There is nothing in the act which requires notices to be posted or the boundaries of the selected tract to be

marked out on the ground, and it is not permissible to read such conditions into the statute. The act expressly declares just what the Company must do to acquire title, and provides that when those things are done and the selection has been approved, the Company shall be entitled to patent. Section 4 of the act provides that "upon the filing by the said Railroad Company at the local land office" of the list prescribed by the act, and payment of the fees required by law, and upon approval of the selection by the Secretary of the Interior, the Company shall receive a patent for the land; with the further provision that if the land is unsurveyed at the time of selection the Company shall within three months after survey file a new list redescribing the land acording to the survey.

Under the doctrine of Williamson v. United States, 207 U. S. 425, 461, these explicit provisons foreclosed the imposition of further requirements by the Department. The provision as to the form of selection list and the manner in which selected lands shall be described is undoubtedly open to construction. But the declaration that upon filing of the prescribed lists and payment of the fees required by law the Company shall be entitled to patent, is too plain and explicit to leave room for the imposition of additional requirements. Under the rule of the Williamson case it was the duty of the Department to give full effect to the right to select unsurveyed lands granted by the express terms of the act, and it was not within its power to limit or restrict the enjoyment of the privilege thus conferred by imposing conditions and requirements not authorized by the terms of the act.

But the Department made no attempt to impose such conditions—or at least it made no such attempt until years after these selections were made. Hence it is enough to say that the act itself contains no requirement for the posting of notices or the marking of boundaries; nor language which could possibly be construed to contemplate or re-

quire any action of that sort. Granting that if the act contained any general provision for notice, this might be construed to require the marking of boundaries and the posting of notice where the selected land was unsurveyed at the time of selection; there is in the act no provision which calls for any notice of selection except that given by the filing of the selection list. This is pointed out in the decision in Daniels vs. Northern Pacific, to which reference has already been made. As the law itself contains no such condition, it was certainly not incumbent upon the Railway Company to take the steps indicated unless required to do so by some affirmative ruling of the Department. And no such ruling was made. As explained on pages 6 and 7 of the brief of Mr. Bunn and Mr. Donnelly, no attempt was ever made to provide for posting notice until the regulation of February 21, 1908, which became effective April 1, 1908; nor to provide for description by metes and bounds, or for the marking of boundaries, until the regulation of November 3, 1909; and it has been held that neither of these regulations was intended to have, or can lawfully be given, a retroactive operation. And this is aside from the question whether those requirements are valid even as to future selections, as against the rule of the Williamson case.

4.

The point that the description employed in the Company's selection list was sufficient to satisfy the requirement of the act that the list "shall describe the land so as to designate the same with a reasonable degree of certainty," is very well covered in the brief of Mr. Bunn and Mr. Donnelly; but there are one or two phases of the question which may bear elaboration.

Appellant's counsel insist that there is great significance in the difference between the language of the act of 1899 and that of the act of 1898. Their theory is that since the act of 1898 expressly permits selections of unsurveyed land by the description by which the land will be known when surveyed, the absence of similar language in the act of 1899 evinces an intention on the part of Congress to prohibit that form of description and to require the kind of description which counsel advocate. In addition to what is said in the opinion of the court below and in the brief of our associates by way of answer to this argument, we venture the following suggestions:

The act of 1898 confined the Company's selections of unsurveyed land to odd-numbered sections. This made it necessary for the Company to determine, in advance of selection, whether the land desired would, upon survey, fall within an odd-numbered section; and consequently made it necessary to determine in advance what the survey would be and to make selection with reference to such future survey. Therefore Congress might well provide in the act of 1898, that selections under that act must be made by the description by which the land would be known when surveyed, and make that method of description exclusive.

But the act of 1899 was not so limited. Under that act selections might be made in both odd and even numbered sections; and it was thus possible for the Company to make its selections in larger tracts and in solid bodies, without reference to section lines; and therefore in districts deeper in the wilderness than would be practicable under the act of 1898, where it was necessary to tie the selections to established survey lines. This called for more latitude with respect to description; since, to obtain full advantage of the right of selection granted by the act, it might be necessary to describe the selected lands without reference to future surveys. And we submit that, fairly considered, the provisions of the act of 1899 with respect to the description

of unsurveyed lands, are broader, more liberal and more elastic than those of the act of 1898; instead of being more narrow and restricted, as counsel argue.

The language of the act of 1899 may indicate that Congress assumed that under some circumstances it might be necessary to describe selected lands in some manner other than by reference to future survey. But the fact that the act may be held to permit that sort of description does not mean that it can be construed to forbid a description according to survey.

Neither does the fact that provision is made for a case where the lands are not described according to survey, mean that the description by reference to survey cannot be allowed. Grant that the clause of Section 4 which provides that if it is found that the selected tract does not "precisely conform with the lines of the official survey, the Company may describe the tract anew so as to secure such conformity," contemplates a description other than one according to the survey to be made. Does it follow from this that Congress intended to prohibit every other sort of description? We submit that such would be a strained and tortured construction of the law.

Nor does it necessarily follow from the language referred to that a description with reference to the future survey was *not* the only form contemplated. There are many instances where a description in that form requires revision after the survey plat is filed. Take for instance the case of Section 6 in a given township. Before survey, and even after survey in the field but before approval of the official plat, one might well select the North half and the Southwest quarter by those descriptions. After survey the same lands would be described as Lots 1, 2, 3, 4, 5, 6 and 7, the S. ½ of N. E. ¼, S. E. ¼ of N. W. ¼ and the E. ½ of S. W. ¼. Or take the case of a section through which a stream flows or in which there is a small lake. Often it cannot be known in advance of survey whether the

Government surveyors will consider it necessary to "meander" the stream or lake. If meandered, the description of unsurveyed lands must be changed after survey so as to refer to the "lots" into which the surveyors divide the subdivisions contiguous to the stream or lake, by the numbers given them by the surveyors.

5.

What is a "reasonable degree of certainty" within the meaning of the statute? Can it be said that the form of description which the Department for ten years held, and still holds (as witness the decision in Daniels vs. Northern Pacific), to be proper and sufficient—which it even made obligatory and exclusive—is so indefinite and uncertain that it does not come within the terms "reasonable degree of certainty"?

In Balderston v. Brady, 107 Pac. 493, 498, the Supreme Court of Idaho said:

> "The fact, however, that the land was not surveyed could make no difference *where the numbers of the sections were specifically given. The title to unsurveyed lands may be as readily conveyed as that to surveyed lands. It is a maxim of law that that is certain which is capable of being made certain.* 'Id certum est, quod certum reddi potest.' All that remained to be done in order to identify these lands on the ground was to have the survey extended over them. *The description in the grant was definite and certain.*"

But the act of 1899 requires only a "reasonable degree of certainty." The quoted words must be given some meaning. Fairly construed, they indicate an intent to allow considerable latitude in the matter of description. Else

why say "*reasonable degree*"? The form of description which appellants argue for in these cases calls for *absolute* certainty. Surely the words of the act are most elastic in their meaning and purpose.

It must be apparent that the provision that the selection list "shall describe the land in such manner as to designate the same with a reasonable degree of certainty" may be satisfied in several different ways. It might be satisfied, for instance, by a description based upon natural landmarks, water boundaries or artificial monuments, or a combination of these; or by a description tied in, by courses and distances, to the established corners of some completed survey. But this is not to say that a description by reference to the survey thereafter to be made does not conform to the requirement of a "reasonable degree of certainty."

Bear in mind that the question now to be determined is not whether the practice heretofore pursued is the best and wisest that could be devised, but whether it can possibly be held to be permitted by the terms of the act. If under any fair or reasonable interpretation of the statute the form of description sanctioned by the Department can be held to come within the term "reasonable degree of certainty," then the selections must be upheld. In short, the present question, viewed in the aspect most favorable to appellant, is merely whether the construction which the Department put upon the act in the beginning, and steadfastly pursued for so many years, is *possible or permissible* under the language employed by Congress. For when the Department has interpreted the law, and rights have been acquired on the faith of that interpretation, a reconsideration of the question is somewhat limited in its scope, and it is not enough that the later view may favor a practice

different from that formerly established, if the former practice is within any reasonable interpretation of the words of Congress.

Under well known rules the most liberal construction must be given to the language of the act, if liberality of construction is necessary to sustain a Departmental interpretation in pursuance of and upon the faith of which a party has proceeded and upon which his rights depend. But we submit that no such liberality of construction is necessary to sustain the selection in controversy—that it would take a harsh and strained construction, indeed, to overthrow the ruling, early made and long maintained, that a description by reference to future survey is sufficient to conform to the requirement of a reasonable degree of certainty.

6.

The argument for appellant and the language of the opinion in the now overruled and repudiated case of F. A. Hyde et al., 40 L. D., 284, (which has been the sole support for appellant's position) are alike rooted in the idea that a settler on unsurveyed land has an inherent right to notice of any prior claim; so that any mode of procedure for the appropriation of unsurveyed land which does not carry provision for adequate notice to intending settlers who may go upon the land thereafter, is void as against such settlers.

It is somewhat difficult to trace the inception and growth of this idea. Certainly there is nothing in the act of May 14, 1880, to lend it support; nor in any other enactment of Congress that we are familiar with. As an idea upon which future legislation or future Departmental procedure

is to be shaped, it is all very well. It is eminently proper that every reasonable precaution should be taken to give notice of claims fastened upon the public land for the benefit of subsequent claimants, including intending settlers under the homestead law. And regulations aimed at securing reasonable notice of the selection of unsurveyed land, for the protection of possible settlers, are proper enough *when applied to future cases.* But these are considerations of administrative policy and procedure, which relate only to the future. The question now before us is one of construction of an act of Congress; and in the solution of such a question considerations like these have no place—or, at least, cannot be invoked to defeat rights acquired under a different interpretation of the law by an administration holding different views of administrative policy.

Now it is a cardinal rule of statutory construction that where the language of a statute is open to different interpretations, reference may be had to other legislation on similar subjects for the purpose of determining whether there exists a settled legislative policy which will shed light upon the meaning of language used in the act under consideration. (See 36 Cyc. 1146-1150, and cases there cited; Siemens v. Sellers, 123 U. S. 276, 285.)

Examination of other legislation makes it apparent that at and prior to the time the act of 1899 was passed it was the settled policy of Congress in dealing with unsurveyed lands (1) to deal with them by the description to be fastened upon them by survey; (2) to make no provision for particular notice of the appropriation of such lands for the benefit of possible intending settlers thereon; and (3) to make no provision for marking the boundaries of the tracts so granted or appropriated in advance of survey, either for the benefit of possible settlers or for any other purpose.

A familiar illustration of this policy of Congress is found in the numerous railroad and wagon road grants.

Most of these grants were made in advance of survey of a large portion of the lands granted; and most, if not all, made a grant *in praesenti* of the land which when surveyed would constitute the odd-numbered sections within a certain distance from the line of road. Yet it has never been doubted that such grants conveyed a title superior to any right which could be acquired by a claimant who settled on the land while still unsurveyed, but subsequent to the date when the grant became fixed by definite location of the road.

Another illustration is found in the grants of rights of way and station grounds to railroads, which become fixed by the filing of location maps with the Secretary of the Interior, and which take precedence over subsequent settlement claims, although there is no provision for notice to possible settlers. See Stalker v. Oregon Short Line, 225 U. S. 142.

Again in the act of July 1, 1898, passed barely eight months before the act of March 2, 1899, was adopted, Congress expressly provided that unsurveyed lands selected under that act should be described with reference to the survey thereafter to be made, without provision for notice to subsequent claimants or for the marking of boundaries.

Further evidence that it has not been the policy of Congress, in dealing with unsurveyed lands, to make provision for special notice to possible settlers who may go upon the land before survey, is found in the act of August 18, 1894. This act provides that upon application of the governor of a state for the survey of any unsurveyed township, which application is filed in the General Land Office in Washington and not in the local land office, all lands in the township shall be reserved and withdrawn from settlement or other appropriation, until the expiration of sixty days after the filing of the survey plat. Under this act an application for survey, properly made, is held to defeat every settlement claim thereafter initiated. Yet there is no pro-

vision for notice to possible settlers, except the requirement that notice of the application (which may embrace a score of scattered townships) must be published in some one newspaper. And the inadequacy of such a publication to convey actual notice to wilderness settlers is too apparent for argument. It is obviously less effective than the notice conveyed by a selection list filed in the local land office.

None of these acts carry any requirement that the boundaries of the lands granted or reserved should be marked out upon the ground, so as to give notice to intending settlers; nor has anything of the sort ever been considered necessary by the Department or the courts. We understand that the first requirement for the marking of boundaries on the ground ever imposed by the Department upon the selection of unsurveyed lands is found in the regulations of November 3, 1909.

Thus it appears that it has long been the policy of Congress to deal with unsurveyed lands by the description which will be given them by survey; and that grants by this form of description have always been held to confer rights superior to any which might be acquired by subsequent settlement under the act of May 14, 1880. And it appears that Congress has never considered it necessary or proper to make any provision for notice for the benefit of possible settlers before survey, of the rights passing under such grants. Nor has it ever been supposed that a settler under the act of May 14, 1880, acquires any rights against the prior grant because he is without notice of such grant. Yet it is argued that the Department should read into the act of 1899 a requirement for notice which Congress itself did not see fit to put there. What reason is there for this distinction? We submit that every element of notice to the settler is present in a selection made as these selections were made, which such a settler has or could obtain of

prior rights under the railroad, school land, and right of way grants, or under the act of August 18, 1894.

It is, of course, unnecessary to demonstrate, by argument or authority, that it is within the power of Congress to grant lands by reference to future survey, or to grant the right to select lands by that description, and to make the right of the grantee or selector superior to any claim which may be initiated after the date of the grant or selection.

Nor does the Constitution impose upon Congress the duty to make provison for adequate notice of such appropriation for the benefit of a claimant who might thereafter settle on the land. In matters of this sort the power of Congress is plenary, and its discretion uncontrolled. It may make such provision for notice as it sees fit, or it may make no provision for notice at all. The settler on unsurveyed land has no rights save those which Congress has conferred upon him; and he must take those rights as they are given, with whatever risks, uncertainties and conditions the enactments of Congress have left them under.

The question is not whether *title* to the land passes, as against the Government, until the survey is complete; but whether a right can be acquired by such selection which shall be superior to any right based upon a claim thereafter initiated.

7.

Counsel for appellant, on pages 7 and 8 of their brief, refer to the "Act of June 6, 1900" as being the act by which the right of a settler on unsurveyed land is fixed and defined; and build somewhat upon the theory that this legislation was enacted *after* the passage of the Act of March 2,

1899. Now, of course, the rights of setlers on unsurveyed land are defined by Section 3 of the act of May 14, 1880, (21 Stat. L. 141) which, except as explained below, has stood unchanged from the day of its enactment. This section, as it was originally framed, and as it stands today, is in the language quoted on page 7 of appellant's brief. The act of June 6, 1900, (31 Stat. L. 683) merely adds to the section a provision covering the case of a woman who settles while unmarried and then marries before final proof. The act of June 6, 1900, does not even re-enact the language of the original section. It runs as follows:

> "That the third section of the act of Congress approved May 14, 1880, entitled 'An act for the relief of settlers on public lands' *be amended by adding thereto the following.*"

Obviously this does not give the provisions of the act of May 14, 1880, relating to settlement on unsurveyed land precedence, as a statute of later enactment, over the act of March 2, 1899—which is a theory counsel seems to have evolved from their erroneous idea that those provisions will be deemed to speak as of the date June 6, 1900.

In this connection (and on page 8 of their brief) counsel for appellant advance a theory which we think requires no notice, except in so far as it is accompanied by the statement that "this is now the rule of construction and interpretation adopted by the Honorable Secretary of the Interior and the Commissioner of the General Land Office in construing this very act, that is, the act of March 2, 1899"; citing the Commissioner's decision of March 5, 1913, in the case of Carrie E. Shearer vs. Northern Pacific Railway Company and Edward Rutledge Timber Company, Intervenor. We shall file in this court before the hearing a certified copy of the decision cited, and of the decision of the Secretary of the Interior on appeal in the same case. From these it will appear that Mrs. Shearer, the claimant, made settlement on the land in June, 1902, two years *before* the

selection thereof by the Railway Company, which was made on June 27, 1904. The question before the Department was merely the question of fact whether Mrs. Shearer's settlement was made at the date alleged and was thereafter maintained in good faith and in compliance with the requirements of the homestead law. The effect of the instruction of March 20, 1911, reported under the title of Northern Pacific Railway Company vs. State of Idaho, 39 L. D. 583, to which reference is made in the Commissioner's decision, will be apparent upon examination of that opinion. And it seems to us very clear, not only that these decisions have no tendency whatever to support the proposition to which they are cited, but that there is very little excuse for a reference to them as authority on that proposition.

In truth, we think that appellant's brief shows some tendency towards recklessness of statement here and there. After discussing the case of F. A. Hyde et al, 40 L. D. 284, counsel says:

> "The fact is that both the Commissioner of the General Land Office and the Department of the Interior have, without exception, followed the construction contended for by appellant as to the act of March 2, 1899, and other kindred acts, in all matters pertaining to lieu selections, with the single exception of the decision in appellant's case."

Now, we are advised that in no case that has been decided either by the Commissioner of the General Land Office or by the Department of the Interior, has the doctrine of the Hyde decision or "the construction contended for by appellant as to the act of March 2, 1899," been recognized or applied. On the contrary, that "construction" and the rule put forward in the Hyde case were explicitly repudiated, and the Hyde case expressly overruled, by the Department in Daniels vs. Northern Pacific. Moreover Hanson vs. Northern Pacific, 38 L. D. 491 is flatly against

appellant's position. And before the decision in the Daniels case, the doctrine of the Hyde case had been qualified and cut down in various decisions of the Department, including the Secretary's decison of June 14, 1913, denying rehearing in the case of State of Idaho vs. Northern Pacific, and the decisions of June 13, 1914, in the cases of Geo. A. McDonald vs. Northern Pacific, which deals with a selection under the act of 1899, and John Bartholomew vs. Northern Pacific, involving a selection under the act of July 1, 1898. These decisons have not yet been reported, but certified copies will be filed in this court before the argument.

8.

It should be borne in mind that the question before the court in this case is not one which has to do with substantive rights granted by the law, but only with the course of *procedure* to be followed in perfecting rights so granted. The Department construed the statute to require and permit certain steps to be taken. Those steps were taken in good faith by the party claiming under the act, in exact accordance with the rules laid down by the Department, and in reliance upon the Departmental construction. No one has been misled or prejudiced. Under these circumstances we submit that it is not the duty of the court to resort to refinement of reasoning for the purpose of overthrowing that construction. After all the question at this late date is not what interpretation the Department ought to put upon the provisions of the act of 1899, if the question were now before it for the first time. The question is whether the construction which the Department did put upon the act in the very beginning, which it steadfastly adhered to in administrative procedure for more than ten

years, and which it still consistently adheres to, as a matter of construction, is so obviously unreasonable and so contrary to the terms and intent of the statute as to afford no protection to parties proceeding in reliance upon it. Unless the statute is so clear as to leave no doubt as to its meaning, and the interpretation thus placed upon it by the Department is plainly and palpably unreasonable, then that interpretation should not now be departed from to the prejudice of rights acquired upon the faith of it.

No rule is more firmly established than that which declares that when the intent of a statute is in any respect doubtful, the construction placed upon it by the Department in contemporary administration must be given great weight, and that when such construction has been continuously recognized and applied over a series of years it must be regarded as conclusive—even though such construction is of doubtful correctness if considered as an original propostion.

Louisiana v. Garfield, 211 U. S., 70.
United States v. Moore, 95 U. S., 760.
United States v. Burlington, etc., Railroad, 98 U. S., 334, 341.
Hastings, etc., Railroad v. Whitney, 132 U. S., 357, 366.
Heath v. Wallace, 138 U. S., 573, 582.
United States v. Alabama, etc., Railroad, 142 U. S. 615, 621.
Orchard v. Alexander, 157 U. S., 372, 383.
Hewitt v. Schultz, 180 U. S., 139, 156, 163.
United States v. Hammers, 221 U. S. 220, 228.
O'Connor v. Gertgens, 85 Minn., 481, 496.
Johnson v. Fleutsch, 176 Mo., 452; 75 S. W. Rep., 1006.

Another well settled rule, applicable in this connection,

is that the general law commits to the Department the authority to prescribe regulations governing procedure for the appropriation of public lands under the various acts of Congress, although there may be no express delegation of that authority in the particular act. When Congress, in the act of 1899, provided that selected lands should be described "with a reasonable degree of certainty," it committed to the Department the duty and authority to determine what form of description should constitute a reasonable degree of certainty. And when the Department, in the exercise of the discretion thus confided to it, ruled that a description by reference to the future survey was sufficient under the act, and was the best and most practical form of description, it established a rule of property which should not now be overthrown.

Furthermore it is familiar doctrine that while respect is always given to the construction put upon a statute by the Department charged with its administration, even where that construction deals with matters of substantive right, still greater weight is given to the departmental construction of those provisions of the statute having to do with *procedure thereunder*.

This, of course, is independent of the rule discussed in an earlier section of the brief to the effect that a party is protected by the rulings of the Department in matters of procedure, however erroneous such rulings may be in the eye of the law, where he has in good faith proceeded in accordance with the rules thus laid down. That principle of law protects a claimant against the reroactive operation of a change of view, whether that change consists in new regulations or in an altered construction of prior statutes; and in those cases it is not material that the former pro-

cedure was based upon a view of the law so plainly erroneous that it cannot be permitted to control future transactions. The rule immediately under consideration is one which forbids the overthrow of the settled departmental construction—which recognizes that such construction has established a rule of property not to be overturned—unless the intent of the statute is clear and free from doubt and the error of the former construction is perfectly plain and palpable.

9.

The argument that the act of 1899 was a *grant,* and as such should be strictly construed against the Railway Company, is well answered in the brief of Mr. Bunn and Mr. Donnelly, as well as by the Court below in its quotation from the opinion in State of Idaho v. Northern Pacific, 37 L. D. 135, 138, where the Secretary said:

> "The act is contractual in character and terms, and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer. This is especially true where this amounts to a limitation upon the enjoyment of the right by the party as to whom the contract still remains executory. In the opinion of the Department every element of a contract is present in the act of March 2, 1899."

But even if the act were a "grant," as counsel understands that term—that is, if it were of such a character that it should be construed by the same rules as the original grant to the Northern Pacific—nevertheless it does not follow that an especially strict construction should be applied. The latest expression of the Supreme Court of the United States on this subject is found in Burke v. Southern

Pacific, 234 U. S. 669, 679, where Mr. Justice Van Devanter says of a grant similar to the original Northern Pacific grant:

> "We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties *were brought into such contractual relations that the terms of the proposal became obligatory on both.* Menotti v. Dillon, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, *it earned the right to the lands described.* Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant *should not be treated as a mere gift.*"

10.

In the Court below counsel argued that the land in suit was not subject to selection under the act of 1899 because, as counsel asserted, it was not "classified as non-mineral at the time of actual government survey" within the intent of the act, and that the Northern Pacific Railway Company was not entitled to make selections under the act as the successor in interest of the Nortern Pacific Railroad Company. These propositions, although made the basis for assignments of error, have been abandoned by appellant; the first altogether, and the second except as it is used as a makeweight in the argument of another question; so that it would seem that we are relieved from the necessity for discussing either of them. But a sufficient answer to them lies in certain rules of law which should be held in mind in considering other questions in the case, and it may be well to dispose of them finally by reference to those rules.

These are the rules which must govern the courts in the consideration of suits attacking a patent title. So far as material in the case at bar they are as follows: A patent of the United States is not only a conveyance; it is also the judgment of a quasi-judicial tribunal to which questions relating to the disposition of the public lands are confided that the patentee is entitled to the land. Where the land covered by the patent is land which was within the jurisdiction of the Department (as is the case here) the patent is impervious to collateral attack. It cannot be questioned in any form of action at law, but only by suit in equity by the Government to set aside the patent, or by an individual claimant to have the patentee declared trustee of the legal title for his benefit. In such a suit the patent is conclusive upon all questions of fact, or mixed law and fact, actually decided by the Department or neces-

sarily involved or implied in the determination that the patentee is entitled to the land; and the court will give relief only against errors of law, fraud, and palpable mistake. And where the suit is by an individual claimant it is essential that he should himself have so complied with the law as to be entitled to patent as against the Government. Where the patent title is questioned in a suit of this character, *the burden is upon the party attacking it to controvert, by competent and conclusive evidence, every theory of fact upon which the patent might be sustained. No inferences or presumptions will be indulged adverse to the patent title.* There must be a clear and unequivocal showing of superior right in the plaintiff; and this conclusion cannot be made to depend upon inferences or upon evidence susceptible of a construction which would sustain a judgment for the patentee. The patent imports an adjudication by the Department of the existence of every fact necessary to entitle the patentee to the land; and this adjudication cannot be overthrown save by a clear, conclusive and unequivocal showing of the non-existence of such facts, or of the existence of facts creating a superior right in the plaintiff; and in either case *the burden is upon the plaintiff and must be sustained by him at all points.* And where there is any conflict or uncertainty in the showing, or where conflicting inferences may be drawn from the evidence, although undisputed, the burden is not sustained and the patent will control.

Smelting Co. v. Kemp, 104 U. S., 636, 640, 647,
Maxwell Land Grant Case, 121 U. S., 325, 379, 381,
Lee v. Johnson, 116 U. S., 48, 50,
Steel v. Smelting & Refining Co., 106 U. S., 447, 450-454,
Bohall v. Dilla, 114 U. S., 47, 51,
Sparks v. Pierce, 115 U. S., 408, 413,
Marquez v. Frisbie, 101 U. S., 473, 475,
Quinby v. Conlan, 104 U. S., 420, 425,
Whitcomb v. White, 214 U. S., 15,

Ross v. Day, 232 U. S., 110, 116.

Leonard v. Lennox, (C. C. A. 8th Cir.), 181 Fed., 760, 762,

Perhaps the best and most comprehensive statement of these rules to be found in any single case, is that made by Mr. Justice Van Devanter (then Circuit Judge) in Leonard v. Lennox, supra; but there is no one case which exhibits the full scope and extent of the rules, and they cannot be fully comprehended and understood without a pretty general reference to the authorities cited above. The rule which is perhaps least well understood is that which relates to questions of *mixed law and fact*. That rule is best illustrated in the cases of Marquez v. Frisbie, Whitcomb v. White, and Ross v. Day, supra. In Whitcomb v. White, Mr. Justice Brewer said (and this language is quoted with express approval in Ross v. Day, decided at the last term of the Supreme Court).

> "The decision of the Land Department was not rested solely upon the fact that White's formal application was filed a few hours before that of the trustee for the occupants of the townsite, but rather chiefly upon the priority of the former's equitable rights. So far as such decision involves questions of fact it is conclusive upon the courts. Johnson v. Towsley, 13 Wall. 72, 86; Shepley v. Cowan, 91 U. S., 330, 340; Marquez v. Frisbie, 101 U. S., 473, 476; Quinby v. Conlan, 104 U. S., 420, 425, 426; Burfenning v. C., St. P., M. & O. Ry., 163 U. S., 321, 323; De Cambra v. Rogers, 189 U. S., 119, 120. *And this rule is applied in cases where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is.* As said by Mr. Justice Miller in Marquez v. Frisbie, supra, p. 476: 'This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.'"

Now the patent under which the respondents hold amounts to an adjudication by the Department that the Rail*way* Company had succeeded to the rights of the Rail*road* Company, and as such successor was entitled to make selections under the act of 1899, and that the land selected was of the character subject to selection under the act; that is, that it was land classified as nonmineral within the intent of the statute. Indeed, the patent carries an express adjudication, in terms, that the Rail*way* Company "is the lawful successor in interest" of the Rail*road* Company, and as such entitled to the land (Record, p. 69).

No attempt whatever, was made by appellant to introduce evidence bearing in any way upon the question of the successorship of the Rail*way* Company; and no evidence was introduced having the slightest tendency to show that the land in question was not affirmatively classified as nonmineral at the time of survey. On the other hand, the decision of the Secretary of the Interior affirming the rejection of appellant's homestead application, which is in evidence in this case and is made part of the record by reference to the reported decision in 37 L. D., 135 (Record, p. 67), contains an express finding with respect to this land in the words, *"The returns made at the time of actual survey classify the same tracts as nonmineral."*

It seems very plain, therefore, that neither of the questions indicated is open upon the present record. On that record it appears that these questions were questions of fact, or at most questions of mixed law and fact, upon which the decision of the Department is conclusive. It is therefore unnecessary to consider either proposition in its legal aspect. And indeed, if the question were open it might well be submitted on the very thoughtful and scholarly discussion in the opinion of the learned District Judge.

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